

SUPREME COURT OF NIGERIA

6TH APRIL, 2001. SC.111/1995

**CORAM:- S. M. A. BELGORE, E. O. OGWUEGBU, S. U. ONU,
U. A. KALGO, S. O. UWAIFO, JJSC.**

1. BEN JEKPE

2. EMMANUEL JEKPE PLAINTIFFS

(For themselves and on behalf of

Imiekpe Ruling Kindred of Okpekpe)

AND

1. CHIEF (DR.) S.T.ALOKWE

(For himself and on behalf of Imida

family of Okpekpe)

2. MILITARY GOVERNOR, BENDEL
STATE.

3. COMMISSIONER FOR SPECIAL DEFENDANTS
DUTIES (Chieftancy Affairs)

Bendel State.

4. ATTORNEY-GENERAL &
COMMISSIONER FOR JUSTICE

Bendel State.

5. ALHAJI CHIEF DIRISU S. UGONOH

6. MR. JULIUS OKAHAIYEMHE

(For themselves and on behalf of Imiebe

Kindred of Okpekpe)

APPEALS - Error - Retrial - Procedure adopted by the trial court - Was merely a technical error - Which was not inconsistent with the rights of the parties - And does not warrant an order for retrial (H 5)

APPEALS - Error - Evaluation of evidence - The trial judge corrected the error - In the first part of his judgment - By further evaluating all the evidence - Before dismissing the claim finally - And so occasioned no miscarriage of justice (H 2)

APPEALS - *Error of trial judge - Where the trial judge dismissed plaintiff's entire claim - Without evaluating evidence - He was in error - And retrial would have been ordered - If he had closed his judgment at that stage (H 1)*

EVIDENCE - *Consideration of - Having rightly declared the Exhibits of "no moment" for non registration - The trial judge adopted the right approach - In considering evidence of the relevant customary laws (H 6)*

JUDGMENTS - *Procedure or style - Adopted by the court - In writing its judgment - Is not material - Once some important considerations are made (H 3)*

JUDICIAL PRECEDENTS - *Distinguishing - The procedure adopted in this case - Is distinguishable from that adopted in *Mogaji v. Odofin* - And occasioned no miscarriage of justice (H 4)*

FACTS

The appellants suing for themselves and on behalf of their ruling kindred were the plaintiffs in a suit instituted at the Auchu judicial division of the High court of former Bendel state of Nigeria against the 6 respondents who were defendants. They claimed ten reliefs at the court in the form of declarations relating to the customary title of the clan Head of Okpekpe and the holder of the chieftancy title thereon. They equally claimed three reliefs of order of perpetual injunction against the respondents.

The trial judge in a reserved judgment dismissed the plaintiffs claims initially on the grounds that they had not proved or asked for all the reliefs in court as the 1st plaintiff in his cross-examination in court had only asked for the 1st relief in their statement of claim only. He however still went ahead to evaluate the evidence before finally dismissing the claim in its entirety. The plaintiffs being dissatisfied with the judgment appealed to the Court of Appeal against it and the defendants cross-appealed. The appeal was dismissed substantially and only succeeded partially. The plaintiffs have further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“(i) Whether the learned Justices of the Court of Appeal were justified in law in dismissing the plaintiffs’ claims, having held that the learned trial judge erred in giving his judgment in utter disregard to the principles enunciated in Odofin & Others v. Mogaji & Others (1978) Vol. II N.S.C.C. 275.

(ii) Whether the learned Justices of the Court of Appeal were justified in law in holding that the learned trial judge was right in proceeding to deal with the entire evidence of the parties having held that the learned trial judge violated the principles in Odofin & Others v. Mogaji & Others, (1978) Vol. II, N.S.C.C. 275

HELD (Unanimously dismissing the appeal per lead judgment of **OGWUEGBU JSC**)

Error in approach

1. Having considered the judgments of the courts below, I agree with the court below that the learned trial judge was in error when he dismissed the plaintiffs’ claims in their entirety. This is a very wrong approach and if the judgment had stopped there, the appeal would have been allowed for failure of the learned trial judge to comply with the fundamental principles of law as laid down in the case of *Mogaji v. Odofin* (1970) (sic) 4 SC 91. (p. 997 H)

Correction of error in judgment

2. Having considered the judgment of the court below, I entirely agree that the learned trial judge after discovering the error in the first part of his judgment adopted the right procedure before finally dismissing the plaintiffs’ claims. He made a quick “U” turn when he realised that he could be wrong in the first part of his judgment. Thereafter, he meticulously and dispassionately evaluated all the evidence placed before him, ascribed probative values to the evidence and finally dismissed the claims. The complaint on the wrong procedure adopted by the learned trial judge in this case has been over flogged and ought to be laid to rest. It was an error that did not occasion any miscarriage of justice.(p. 998 E)

Style for writing judgment

3. It must be emphasized that there is no set style which must be followed by trial courts when writing judgments. Judges must no doubt differ in the procedure and style which they adopt in their consideration of the entire evidence. It is not very material whether the judge starts with the consideration of the defendant's case before that of the plaintiff and vice versa. What is important is that he should first of all put the whole evidence led by the parties on that imaginary scale. He will put the evidence adduced by the plaintiff on one side of the scale and that of the defendant on the other side and weigh them together. He will then see which is heavier by the quality or probative value of the testimony as against the quantity or number of the witnesses. After this, the judge applies the law, if any, before he comes to his final conclusion based on the accepted evidence. See *Mogaji v. Odofin* (supra), (p. 998 H)

Distinguishing

4. The procedure laid down in *Mogaji v. Odofin* (supra) is a guide to trial courts. I should also point out that the procedure adopted by the learned trial judge in *Mogaji v Odofin* (supra) is distinguishable from that adopted by the trial judge in the present proceedings. In the earlier case, the evidence adduced by the parties was neither put on the scale nor weighed at all before the learned trial judge found for the plaintiffs in that case. That was not the case in the present proceedings. I am unable to come to the conclusion that the procedure in this case occasioned any miscarriage of justice. The court below was right. (p. 999 C)

Technical error

5. I had dealt with this issue when I considered the first issue for determination. I had come to the conclusion that the procedure adopted by the learned trial judge is at best a technical error which is not substantial and it did not lead to miscarriage of justice in the sense that the decision or the outcome of the proceedings is not prejudicial or inconsistent with substantial rights of the parties. I have examined the whole proceedings in the courts below and I am of the firm view that the error does not war-

rant the reversal of the judgment and an order for retrial. See *People v. Lopez* 251 Cal. App. 2d 918, 60 Cal. Rptr. 72, 76. (p. 999 H)

Relevant customary laws

6. Having found that Exhibits 20 and 21 are of “no moment” for non-registration which is the same thing as being null and void as correctly held by the court below, the learned trial judge applied the ratio in *Adigun & Ors. v. Attorney-General of Oyo State & Ors.* (1987) 3 SC 250 by considering the evidence of the relevant customary law in relation to Okpekpe Clan headship. That approach cannot be faulted. (p. 1001 C)

REPRESENTATION

Chief A. O. Okeaya-Inneh with him N. Chukwu and E. A. Ichoku for the appellants.

Chief C. O. Ihensekhien SAN with him Prince M. O. Ighodalo for the 1st Defendants / Respondents.

F. O. Orbih Esq., for 5th and 6th Defendants / Respondents.

2nd and 4th Defendants / Respondents absent not presented.

CASES REFERRED TO

Ebba v. Ogodo (1984) 1 SCNLR 37

Woluchem & Ors. v. Gudi & Ors. (1981) 5 S.C. 291 at 294

Duru & Ors. v. Nwosu (1989) 10 N.W.L.R. (pt,113) 24

Uchendu & Ors. v. Ogboni & Ors. (1999) 10 N.W.L.R. (pt.603) 337 at 363

Tunde v. Opewole (2000) 2 N.W.L.R., (pt.644) 275 at 288-289

People v. Lopez 251 Cal. App. 2d 918, 60 cal. Rpte. 72, 76

Adigun & Ors. v. Attorney-General of Oyo State & Ors. (1987) 3 S.C. 250

Mogaji v. Odofin (1978) NSCC (vol.11) 275 at 277

Okulate v. Awosanya (2000) 2 N.W.L.R. (pt.646) 530 at 546

LEAD JUDGMENT BY OGWUEGBU JSC

The appellants in this appeal were plaintiffs in Suit No. HAU/40/

89 which originated in the Auchi Judicial Division of the High Court of the former Bendel State of Nigeria. The respondents herein were the defendants. There were three sets of defendants and each set filed a Statement of Defence. The 1st defendant who is the 1st respondent in this court stands alone. The second set is represented by the 2nd, 3rd and 4th respondents and the third set is represented by the 5th and 6th respondents.

In paragraph 63 of the Further Amended Statement of Claim, the plaintiffs claimed ten reliefs in the form of Declarations that the Apa of Okpekpe is the customary title of which the Clan Head of Okpekpe is known and addressed, that the Imiekpe kindred of the plaintiffs is the sole and exclusive ruling kindred in Okpekpe, that the 1st plaintiff is entitled to be recognised by the 2nd to the 4th defendants as the holder of the chieftaincy title of Apa of Okpekpe, that the 1st plaintiff is entitled to be appointed to the vacant stool of the Clan Head of Okpekpe in Etsako Local Government Area in the former Bendel State, that the Declaration made by the Bendel State Government relating to the chieftaincy title of Onwuewoko (Clan Head) of Okpekpe which was published as Bendel State Legal Notice No.2 of 1990 in the Bendel State of Nigeria Gazette no.4 Vol.27 of 15th January, 1990 is illegal, unconstitutional, null and void as it is contrary to the customary law of Okpekpe and the Constitution of the Federal Republic of Nigeria, 1979 and that the creation of the new traditional chieftaincy title of Onwuewoko of Ikpekpe by the 2nd to 4th defendants and the appointment of the 1st defendant thereto is illegal, null and void. The last three reliefs were prayers for orders of perpetual injunction.

The case was tried on the pleadings filed and exchanged by the parties by Maidoh, J. On 30th May 1991, in a reserved judgment, he dismissed the plaintiffs' claims in their entirety. The plaintiffs appealed to the Court of Appeal, Benin Division and the 5th and 6th defendants cross-appealed. In its judgment, the court below allowed the plaintiffs' appeal in part and held as follows:

“It is the judgment of this court that the appeal has failed substantially. Appeal succeeds partially. The judgment of the lower court is upheld in substance except on the question of Relief 63(g) whereby the

Declaration sought by the appellants is granted.... In the light of the above, I therefore hold that the cross-appeal lacks merit and is dismissed..."

Aggrieved by the partial dismissal of their appeal the plaintiffs have further appealed to this court.

When the appeal came up for hearing on 9th January, 2001, the attention of the court was drawn to a notice of intention to withdraw the appeal against all the respondents, signed by the 1st appellant for himself and on behalf of the other appellants and filed on 12-7-2000. The 1st appellant who signed the notice was in the court and he confirmed that he filed the notice for himself and on behalf of Imiekpe Kindred of Okpeke, the appellants. The 3rd and 4th appellants on record who were also in court filed counter-affidavits disowning the purported notice and averred that they did not authorise 1st appellant to withdraw the appeal and he did not obtain their consent to do so. They expressed their readiness to go on with the appeal having filed their brief of argument. The court allowed the 1st appellant to withdraw from the appeal and struck out his name. The name of the 2nd appellant who is dead was also struck out. The appeal proceeded on the briefs filed by all the parties and counsel appearing for the parties adopted their respective briefs and made oral submissions in amplification of the briefs. The appeal was adjourned to today for judgment.

The plaintiffs filed the following grounds of appeal:

GROUND OF APPEAL

1. That the learned Justices of the Court of Appeal erred in Law in upholding the JUDGMENT of the Court of trial having upheld Ground 1 of the Plaintiffs appeal and held that the Learned trial Judge jumped the gun, thus dismissing Plaintiffs' Claim.

PARTICULARS OF ERROR

- a. The learned trial Judge did not consider or evaluate the entire evidence before him before giving judgment.*
- b. The learned trial Judge breached the principles enunciated in the following Cases:*

(a) Savannah Bank of Nigeria vs. Pan Atlantic Shipping Co.

Ltd. 1987 1 NWLR (Pt. 49); Page 212; ratio 15 at 216.

(b) Mogaji vs. Rabiatsu Odofin & ors; 1978 2SC 91 at 93 per Fatayi Williams as he then was.

(c) Sanusi vs. Ame Oyoguo (sic) 1992 4 NWLR (Pt. 237) page 527.

c. Whereas 1st Plaintiff, 4th Plaintiff and the other three witnesses gave evidence and tendered several exhibits.

d. The Learned trial Judge adopted a very wrong approach abandoning his primary duty of evaluating all the evidence placed before him and ascribing probative values to them before dismissing Plaintiffs' claim.

2. That the Learned Justices erred in law in affirming the dismissal of Plaintiffs' claims by the Learned trial Judge, having upheld the submission of Plaintiffs/Appellants in declaring Exhibit 20 null and void, contrary to Section 6(1) & (2) of the Traditional Rulers and Chiefs Edict, 1979.

PARTICULARS OF ERROR

(a) Whereas the trial Judge shield (sic) away from making a direct resolution in Exhibit 20 which was null and void in the case before him;

(b) Whereas the said Exhibit 20 embodying (sic) the Declaration as to Chieftaincy Succession; B.S.L.N. No. 2 of 1990 was null and void.

3. That the Learned Justices of the Court of Appeal erred in Law in upholding that the Judgment succeeds in substance but the appeal succeeds partially.

PARTICULARS OF ERROR

(a) The Learned justices of the Court of Appeal held that the approach by the Learned trial Judge was totally wrong, irregular and unfortunate;

(b) The Exhibit 20 which was declared null and void embraced the consideration of the facts in the case which the said Exhibit 20 was to crystallize for all intents and purposes i.e the Onwueweko (Clan head) of Okpekpe.

(c) The Court of Appeal held that Exhibit 20 is definite issue at the trial before the Learned trial Judge;

(d) That parties in the Case joined issues in respect of Exhibit 20 – “Dec-

laration of the Customary Law Regulating Succession t the Clan Headship Title in Okpekpe”;

(e) The 1st Defendant/Respondent claims his appointment as regular and in accordance with the Provisions of Traditional Ruler and Chiefs Edicts of 1979;

(f) When the 1st Defendant/Respondent claims his appointment as regular in accordance with Okpekpe Native Law and Custom which hardened into the Statutory Provision in a Legal Instrument No.2 of 1990, which is null and void.”

From the above grounds of appeal the appellants formulated two issues for determination in this appeal:

“(i) Whether the learned Justices of the Court of Appeal were justified in law in dismissing the plaintiffs’ claims, having held that the learned trial judge erred in giving his judgment in utter disregard to the principles enunciated in *Odofin & Others v. Mogaji & Others* (1978) Vol. II N.S.C.C. 275.

(ii) Whether the learned Justices of the Court of Appeal were justified in law in holding that the learned trial judge was right in proceeding to deal with the entire evidence of the parties having held that the learned trial judge violated the principles in *Odofin & Others v. Mogaji & Others*, (1978) Vol. II, N.S.C.C. 275

In their respective briefs of argument, the three sets of defendants who are respondents in this court filed briefs of argument. Each set formulated issues for determination in the appeal which, in my opinion, are covered by the two issues identified by the appellants. The appeal will be considered mainly on the two issues.

The complaint of the plaintiffs in their first issue for determination stemmed from the consideration of and the conclusion reached by the court below on the first issue formulated by the appellants in their brief of argument before that court. It reads:

“Whether the learned trial judge was justified in dismissing the plaintiffs’ claim/reliefs, in utter disregard to the fundamental principles enunciated in the Supreme Court Judgment in *MOGAJI v ODOFIN* (1978) 4 SC 91 at 94.”

After the examination-in-chief of the 1st plaintiff in the court of trial, he was cross-examined by Mr. Erhabor, learned State Counsel who appeared for the 2nd, 3rd and 4th defendants. In answer to a question, the plaintiff replied at p.195 lines 1-5 of the record of appeal as follows:

B “(1) I claim as follows:- Court to declare Imiekpe as the ruling kindred, as the ruling house of Okpekpe because they founded it. The above is all I want the court to do for me.”

C The learned trial judge considered the final address of Mr. Erhabor along with this evidence of the 1st plaintiff and came to the following conclusion:

D “A Court is without power to grant to a party what he did not claim and/or prove. I hold that these latter reliefs have not been proved and the Court is only obliged to consider the 1st relief i.e. paragraph 63(a) of the amended statement of claim. Having regard to my latter findings with regard to paragraph 63(a) of the amended statement of claim, which found the paragraph not proved; I am bound to dismiss the entire plaintiffs’ case. Case is dismissed.”

E The learned trial judge continued:

F “*But in case I am wrong in my finding above I shall now consider other issues canvassed in this case. I shall now proceed to consider the evidential requirement in the case and decide the case on the relative strengths of the case of the parties. In other words the plaintiffs’ case succeed based on the evidence of custom led by them. Can the plaintiffs’ case succeed after exclusion of Exhibits 20 and 21. I shall examine the intelligence reports, the Chieftaincy Committee reports and customary law etc. governing the appointment of the clan head of Okpekpe.*”

H After considering the submissions of learned plaintiffs’ counsel on the above approach by the learned trial judge which was a departure from the principle laid down by this court in *Mogaji & ors. v. Odofin & Ors.* (supra), the court below found that the learned trial judge failed to consider or evaluate the entire evidence before him at the time he dis-

missed the plaintiffs' claim in the first part of his judgment. He was upbraided by the court below for adopting a very wrong approach by abandoning his primary duty of evaluating all the evidence placed before him and ascribing probative value to the said evidence. On the first issue before it, the court below concluded thus:

"This is a very wrong approach and if the judgment had stopped there, the appeal would have been allowed straight away for failure of the learned trial judge to comply with the fundamental principles of law as laid down in the case of Mogaji v. Odofin (1970)(sic) 4 SC 91.

But the learned trial judge did not end his judgment on page 314 of the Records. He proceeded to do the right thing with the entire evidence before him. It is my view that when one looks at the objective way in which the learned trial judge handled the case after page 314 of the Record one is bound to be convinced that the learned trial judge gave the case of both parties the proper judicious consideration which it deserves. The fear of the appellants that they may not receive a fair and judicious consideration of their case henceforth was most unjustified."

It is the contention of the plaintiffs' counsel that the court below having found that the learned trial judge flouted the principles laid down in *Mogaji & ors. v. Odofin & ors.* (supra), the plaintiffs' appeal to that court ought to have been allowed and the case remitted for retrial because the trial judge having decided the case midstream, the further evaluation he made was cosmetic. The case of *Uchendu v. Ogboni* (1999) 4 SC (Pt.11) 1; (1999) 5 NWLR (Pt.603) 337, *Okulate v. Awosanya* (2000) 2 NWLR (Pt. 646) 530 at 546 and *Ebba v. Ogodo* (1984) 1 SCNLR 37 were cited. We were urged to invoke our powers under section 22 of the Supreme Court Act Cap. 424 Laws of the Federation, 1990 and order a retrial.

It was submitted in this court on behalf of the 1st defendant that the learned trial judge retraced his steps after holding that the 1st plaintiff who did not go through the ritual of repeating every word in the statement of claim as specified in the reliefs claimed at the end of his evidence must be deemed to have abandoned those reliefs hence the claims were dismissed. It was further submitted that from page 314 of the record of appeal, the trial judge strictly complied with the principles laid down in the

case of *Woluchem & ors. v. Gudi & Ors.* (1981) 5 SC. 291 at 295 and *Mogaji & Ors. v. Odofin & Ors.* (supra).

The learned counsel for the 1st defendant referred to various findings of the court below which were not faulted by the plaintiffs in the court below. That at page 599 of the record, the court below found as follows:

“The learned trial judge reviewed the evidence of the parties in the case, gave the case an objective and dispassionate consideration that his reasoning could hardly be faulted. He made references to the various claims of the contestants from their own evidence and documents tendered and made his findings and deductions.”

On issue No. (1) it was submitted in the brief of 2nd, 3rd and 4th defendants that the wrong approach taken by the learned trial judge for which the court below rebuked him did not occasion any miscarriage of justice. On the same issue, it was submitted on behalf of the 5th and 6th defendants that the plaintiffs and their counsel appeared not to appreciate the effect and mode of compliance with the principles laid down in *Mogaji & Ors. v. Odofin & Ors.* (supra) and he referred the court to *Woluchem & Ors. v. Gudi & Ors.* (supra).

The Court below in its judgment frowned at the method by the learned trial judge in dismissing the plaintiffs’ claims midstream on the submission of the learned counsel for the 2nd, 3rd and 4th defendants and the evidence of the plaintiff as to the reliefs he was claiming. The learned trial judge did not end the judgment at that stage. He quickly realised that he could be wrong, as indeed he was and from that moment, he reviewed and evaluated the whole evidence led by both parties before dismissing the plaintiffs’ claims.

After dismissing the claims midstream, the learned trial judge continued:

“But in case I am wrong in my finding above, I shall now proceed to consider the evidential requirement in the case and decide the case on the relative strengths of the case of the parties...”

From that moment, the learned trial judge meticulously followed the principle laid down by this court in *Mogaji & Ors. v. Odofin & Ors.*

(supra). Had the judgment ended at the first stage where he dismissed the plaintiffs' claims, it would have been in breach of the principles enunciated in *Mogaji & Ors. v. Odofin & Ors.* (supra) and this appeal would have succeeded.

At the stage when the plaintiffs' suit was dismissed, the trial judge had not considered the case on its merits. He considered the evidence of the 1st plaintiff in relation to the answer to cross-examination and the pleadings as contained in paragraph 63(a) of the amended statement of claim. Relying on the submission of the learned State Counsel who appeared for 2nd, 3rd and 4th defendants to the effect that 1st plaintiff had abandoned the reliefs claimed in paragraph 63(b) to (k) of the amended statement of claim when he testified that the only relief he wanted from the court was for the court to declare the Imiekpe kindred as the ruling kindred in Okpekpe because they founded Okpekpe, he agreed with Mr. Erhabor's submission and dismissed the suit.

The learned trial judge was wrong in that approach and the court below rightly admonished him as shown hereunder:

"There is no doubt whatsoever that the learned trial judge did not consider or evaluate the entire evidence before him at the time he made those findings and conclusions in the first part of his judgment on pages 313-314 of the Records.... The learned trial judge made use of his ruling on the State Counsel's submission to dismiss the plaintiffs' claims in its entirety.... In this case the 1st plaintiff was not the only plaintiff in the court below. Neither was he the only person who gave evidence for the plaintiffs. 1st plaintiff gave evidence, 4th plaintiff also gave evidence. Then three other witnesses were called and several exhibits were tendered to establish the plaintiffs' claims Nos. 63(a) – 63(k). The learned trial judge only evaluated the evidence of the 1st plaintiff in the first part of his judgment before pronouncing his first verdict of dismissing the plaintiffs' claims at page 314 of the Records."

Having considered the judgments of the courts below, I agree with the court below that the learned trial judge was in error when he dismissed the plaintiffs' claims in their entirety. This is a very wrong approach and if the judgment had stopped there, the

appeal would have been allowed for failure of the learned trial judge to comply with the fundamental principles of law as laid down in the case of Mogaji v. Odofin (1970) (sic) 4 SC 91. After admonishing the trial judge the court below considered the proceedings thereafter and

B stated:

“It is my view that when one looks at the objective way in which the learned trial judge handled the case after page 314 of the Records one is bound to be convinced that the learned trial judge gave the case of both parties the proper judicious consideration which it deserves. The fear of the Appellants that they may not receive a fair and judicious consideration of their case was most unjustified.... The learned trial judge reviewed the evidence of the parties in the case, gave the case an objective and dispassionate consideration that his reasoning could hardly be faulted....

D *The learned trial judge was right in dismissing all the claims of the Appellants except the claim for the relief in paragraph 63(g) of their amended statement of claim. That has been granted earlier on in this judgment. It is the judgment of this court that the appeal has failed substantially. Appeal succeeds partially. The judgment of the lower court is upheld in substance except on question of Relief 63(g) whereby the Declaration sought by the Appellants is granted.”*

F **Having considered the judgment of the court below, I entirely agree that the learned trial judge after discovering the error in the first part of his judgment adopted the right procedure before finally dismissing the plaintiffs’ claims. He made a quick “U” turn when he realised that he could be wrong in the first part of his judgment. Thereafter, he meticulously and dispassionately evaluated all the evidence placed before him, ascribed probative values to the evidence and finally dismissed the claims. The complaint on the wrong procedure adopted by the learned trial judge in this case has been over flogged and ought to be laid to rest. It was an error that did not occasion any miscarriage of justice.**

It must be emphasized that there is no set style which must be followed by trial courts when writing judgments. Judges must no doubt differ in the procedure and style which they adopt in their

consideration of the entire evidence. It is not very material whether the judge starts with the consideration of the defendant's case before that of the plaintiff and vice versa. What is important is that he should first of all put the whole evidence led by the parties on that imaginary scale. He will put the evidence adduced by the plaintiff on one side of the scale and that of the defendant on the other side and weigh them together. He will then see which is heavier by the quality or probative value of the testimony as against the quantity or number of the witnesses. After this, the judge applies the law, if any, before he comes to his final conclusion based on the accepted evidence. See *Mogaji v. Odofin* (supra), *Woluchem & Ors v. Gudi & Ors.* (1981) 5 SC. 291 at 294, *Duru & Ors. v. Nwosu* (1989) 10 NWLR (Pt. 113) 24 and *Uchendu & Ors. v. Ogboni & Ors.* (1999) 10 NWLR (Pt. 603) 337 at 363. The procedure laid down in *Mogaji v. Odofin* (supra) is a guide to trial courts. I should also point out that the procedure adopted by the learned trial judge in *Mogaji v Odofin* (supra) is distinguishable from that adopted by the trial judge in the present proceedings. In the earlier case, the evidence adduced by the parties was neither put on the scale nor weighed at all before the learned trial judge found for the plaintiffs in that case. That was not the case in the present proceedings. I am unable to come to the conclusion that the procedure in this case occasioned any miscarriage of justice. The court below was right.

On the second issue, it was submitted in the plaintiffs' brief that the approach of the court below is an affront to the rules of logic as well as the rules of law and procedure when it held that the trial judge who failed to apply the procedure enunciated in *Mogaji v. Odofin* could proceed to deal with other evidence in the case he had initially prejudged. It was further submitted that a trial judge is not entitled in law to decide a case midstream or to make a resolution with regard to disputes without getting the entire evidence on the imaginary scale. It was finally submitted on behalf of the plaintiffs that the technical breach in this case clearly affects the substantive right to fair hearing of the plaintiffs. The court was referred to the case of *Tunde v. Opewole* (2000) 2 NWLR., (Pt. 644) 275 at 288-289. I had dealt with this issue when I considered the first issue for determi-

nation. I had come to the conclusion that the procedure adopted by the learned trial judge is at best a technical error which is not substantial and it did not lead to miscarriage of justice in the sense that the decision or the outcome of the proceedings is not prejudicial or inconsistent with substantial rights of the parties. I have examined the whole proceedings in the courts below and I am of the firm view that the error does not warrant the reversal of the judgment and an order for retrial. See *People v. Lopez* 251 Cal. App. 2d 918, 60 Cal. Rptr. 72, 76.

Another point canvassed by the plaintiffs in issue (2) is that the court below was not justified in holding that the trial judge was right in proceeding to consider the whole evidence after he had dismissed the plaintiffs' claims and declared Exhibits 20 and 21 null and void for non-registration as required by section 6(1) and (2) of the Traditional Rulers and Chiefs Edict of Bendel State, 1979. I should point out that the learned trial judge did not declare Exhibits 20 and 21 null and void. It was the court below that did so since that consequential order flowed from the finding of the learned trial judge which reads:

"It must be noted that Exhibit 20 will not come into effect until it is so registered. As a result Exhibits 20 and 21 are of no moment"

Sections 6(1) and (2) of the Bendel State Traditional Rulers and Chiefs Edict of 1979 provides:

"6(1) Every draft declaration of a competent traditional council approved by the Executive Council and every declaration made by the Executive Council shall be registered and retained in custody by such officer of the department of Government of the State with responsibility for which the appropriate authority is charged as the Executive Council may direct.

(2) No declaration shall come into effect until it is so registered."

Exhibit 20 was not registered at all and the learned trial judge found so. The purport of the above finding of the trial judge is that Exhibit 20 is null and void but he failed to declare it null and void. The court below did so by giving legal effect to the non-registration and granted the relief in paragraph 63(g). To borrow the expression of the court below, the

learned trial judge shield away from doing so.

The learned trial judge identified two issues in controversy between the parties after reviewing the evidence of both parties, namely:

“1. Whether there is a valid declaration of the customary law regulating succession to the traditional clanship title to Okpekpe. If there is what is its effect and legal implication.

2. If there is no such valid declaration of the said custom, then the Court has to consider what is the customary law in relation to Okpekpe clan headship title and eligibility of the contestants to acquire such title.”

Having found that Exhibits 20 and 21 are of “no moment” for non-registration which is the same thing as being null and void as correctly held by the court below, the learned trial judge applied the ratio in *Adigun & Ors. v. Attorney-General of Oyo State & Ors. (1987) 3 SC 250* by considering the evidence of the relevant customary law in relation to Okpekpe Clan headship. That approach cannot be faulted.

In the final result, all the issues formulated by the plaintiffs are resolved against them. I see no merit in the appeal. I hereby dismiss it and affirm the decision of the court below delivered on 28th April, 1995. The plaintiffs will pay N10,000.00 costs to the 1st and 3rd sets of defendants i.e. 1st defendant and 5th and 6th defendants.

BELGORE JSC

I have read in advance the judgment of my learned brother, Ogwuegbu JSC with which I am in total agreement having previously discussed it in conference. The appeal has no merit and for the reasons clearly set out in the judgment I also dismiss it with the same orders as to costs.

ONU JSC

Having had the opportunity to read before now the judgment of my learned brother Ogwuegbu, JSC just read, I share his views that the appeal lacks merit and ought to fail.

Accordingly, I will dismiss the appeal and make similar conse-

quential orders for costs as contained in the leading judgment.

KALGO JSC

B I have read in advance the judgment of my learned brother Ogwuegbu JSC just delivered, and I agree with his reasoning and conclusions. I find that there is no merit in the appeal and I dismiss it accordingly. I abide by the order of costs made in the leading judgment.

C

UWAIFO JSC

I read in advance the judgment of my learned brother Ogwuegbu JSC and for the reasons stated by him I agree that the appeal be dismissed.
D I shall add a few words.

The 1st plaintiff gave a somewhat lengthy evidence in support of the plaintiffs' case. He was cross-examined by three counsel, one of whom was Mr. Erhabor, learned State Counsel. In answer to some questions put
E by Mr. Erhabor to the 1st plaintiff, he answered (as contained in the printed record):

"I claim as follows:- Court to declare Imiekpe as the ruling kindred as the ruling house of Okpekpe because they founded it. The above is all I want the court to do for me."

F The questions in cross-examination which gave rise to the above-quoted evidence were not recorded. They would appear to be:

Q: What do you claim from the court? (Followed, after an answer, by)

Q: Is that all you want the court to do for you?

G I have imagined these questions so as to be able to make a point of procedure about reliefs claimed by a plaintiff in his statement of claim.

It was those answers in cross-examination which led the learned trial judge into error when, although he reproduced the ten reliefs sought
H by the plaintiffs in paragraph 63(a)-(k) of the statement of claim, he said as follows:

"The court has to consider whether the plaintiffs have led credible evidence that will tilt the scale in their favour as against the defen-

dants' evidence. Mr Erhabor learned state counsel has drawn the court's attention to the entire paragraph 63(a-k) of the amended statement of claim.... Although the 1st plaintiff said that the plaintiffs rely on facts pleaded in paragraph 63 of the amended statement of claim, when (1st) plaintiff was closely questioned what the reliefs in paragraph 63 which they claimed were, (?) gave evidence that what they only wanted from court was for court to declare the Imiekpe family as the ruling kindred in Okpekpe because they founded Okpekpe. The learned state counsel had submitted that the pleadings and evidence are distinct factors and for the plaintiff to establish his case, his evidence must support what is pleaded. .. Facts which are pleaded but not canvassed at the hearing go to no issue and should be disregarded by the court. Mr. Okeaya-Inneh SAN replied that the facts so pleaded in the amended statement of claim and the reply thereto in the amended statement of defence, coupled with the evidence that the plaintiffs relied on the pleaded reliefs, are sufficient...

I agree that parties are bound by their pleadings... In the instant case the 1st plaintiff who gave evidence of the reliefs sought by the plaintiffs for the plaintiffs merely relied on the amended statement of claim... When asked what those reliefs were the 1st plaintiff said that they (plaintiffs) want the court to declare the Imiekpe family as the ruling kindred in Okpekpe because they founded Okpekpe.

I agree with Mr. Erhabor, the learned state counsel that that piece of evidence at best only covers the 1st relief 63(a)... A court is without power to grant to a claimant what he did not claim..."

The point to make here is that the principle of law that evidence must be led to support averments in a statement of claim does not require a plaintiff to recite *viva voce* by heart in his testimony before the court each item of the reliefs he seeks in his statement of claim. A statement of claim may contain a variety of reliefs. The preparation of reliefs sought by a plaintiff is a function of the legal practitioner who settles the statement of claim from the brief he receives from his client. A plaintiff is not expected to know the niceties of the reliefs derivable from the totality of the facts he confides to his solicitor. Mr Okeaya-Inneh SAN was quite right when he said the plaintiffs were claiming the reliefs stated in the amended

statement of claim. Indeed, it is counsel who would say so in his submission. That is not for the plaintiff or any of his witnesses. It was therefore surprising that the learned trial judge thought that if a plaintiff did not in his oral evidence enumerate all the reliefs he sought, he had not led evidence to support his claim and would therefore lose his action. At that stage the learned trial judge did not, obviously, have in mind the evidence in support of the merit of the case. It was a mere irritating *faux pas* committed by him. The itemization of the reliefs sought does not require, if I may repeat, oral evidence for the purpose of applying the principle in *Mogaji v. Odofin* (1978) NSCC (Vol.11) 275 at 277.

However, although the learned trial judge misdirected himself in his view that the plaintiffs needed to recapitulate the items of the reliefs sought in oral evidence, he proceeded thereafter to consider the evidence lead before him in support of those reliefs as well as the evidence of the defendants. I think he eventually weighed the evidence on both sides before coming to a decision in line with the *Mogaji* principle. See also *Woluchem v. Gudi* (1981) 5 SC 291 at 294 where the principle was again stated.

I do not think that in the further effort by the learned trial judge to consider the evidence to arrive at the merit of the case he could be said to have closed his mind to the plaintiffs' case. He was not in that exercise enacting what could be regarded as a parody of justice as was the case in *Mogaji v Odofin* (supra) at p.279 and *Uchendu v. Ogboni* (1999) 10 NWLR (pt. 603) 337 at 355. The learned trial judge gave an objective consideration to all the evidence. In particular he relied on exhibits 16 and 17. These were letters signed by the 1st plaintiff and others on behalf of the present plaintiffs. Exhibit 17 was dated 15 February, 1966 while exhibit 16 was dated 20 August, 1968, both written to the Military Governor of the erstwhile Midwest Region. In those letters admissions were made that the Clan headship of Okpekpe was by rotation between the two kindred's forming the Clan. That was the last straw that broke the camel's back. The plaintiffs were thereby estopped from resiling from that admission.

The lower court quoted copiously from the said exhibits 16 and

17 and observed, per Ige JSC who read the leading judgment:

“The 1st appellant (as 1st plaintiff) did not deny his signature on these 2 documents; how can he now be heard to say that the clan head title does not rotate between the 2 kindred’s of Imida and Imekpe/Imiebe and that Imiekpe people are the sole legitimate ruling kindred in Okpekpe. B How can 1st appellant be heard to complain about the appointment of 1st defendant to the traditional Chieftaincy title of Onwueweko of Okpekpe or appointment of any person from Imida family as the next holder of the title of clan head of Okpekpe howsoever designated. It is my view that the learned trial judge has demonstrated in full a dispassionate appraisal of all the issues properly raised in this case. The plaintiffs/appellants’ case has been demolished and destroyed by they themselves and their witnesses and the documents tendered by them.” C

With such concurrent findings of fact, fully supported by evidence, oral D and documentary, this court cannot interfere with the judgment of the lower court unless special circumstances were shown upon conditions well-known which I need not repeat here.

For the above reasons and the fuller ones given by my learned E brother Ogwuegbu JSC, I too dismiss this appeal. I abide by the order for costs made by him.

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